

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

EMBARQ CORPORATION

Employer¹

and

8-UC-395

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION 1996, AFL-CIO, CLC

Petitioner/Union

DECISION AND ORDER

Upon a petition filed under Section 9(c) of the National Labor Relations Act (the Act), as amended, a hearing was held before a hearing officer of the National Labor Relations Board, (the Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.² United Telephone Company of Ohio, a wholly owned subsidiary of EMBARQ Corporation, and the Petitioner/Union (Petitioner) are Parties to a collective bargaining agreement, effective from May 1, 2004 to April 30, 2007. The recognized bargaining unit is described in the agreement as:

All bargaining unit employees in Appendix “A” (including Installer-Repair, Testboard, Warehouse Delivery, Cashier, Coach, Service Activation Specialist, Sales Service Consultant, Specialist, Repair Clerks and Cable Locator) within the Company’s operations designated as the Warren district with respect to wages, hours and working conditions.

The Petitioner seeks to clarify the bargaining unit to include all retail sales consultants and retail support specialists employed at a retail store located in a shopping plaza at 2023 Elm Street in Warren, Ohio. The Petitioner currently represents network service technicians and building operations/maintenance employees who work at two locations-220 South Park Avenue, Warren, Ohio and 3801 Elm Street, Warren, Ohio. There are approximately 48 employees in the existing bargaining unit.

¹ The Employer’s name was amended at the hearing.

² The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed. The Parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction. The Petitioner is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer. The Parties filed post hearing briefs which I have carefully considered.

The Employer takes the position that the bargaining unit employees and the retail store employees are employed by two separate, but wholly owned subsidiaries of EMBARQ Corporation. According to the Employer, the bargaining unit employees work for United Telephone of Ohio and the retail store employees are employed by Embarq Holding, LLC. The Employer also takes the position that the retail sales consultants and the retail support specialists do not share a sufficient community of interest to warrant their inclusion in the bargaining unit.

The Petitioner asserts that the wholly owned subsidiaries, United Telephone of Ohio and EMBARQ Holding, LLC, as well as EMBARQ Corporation, all constitute a single employer. The Petitioner maintains that the disputed classification of retail sales consultant is similar to the job classification of sales service consultant found in the collective bargaining agreement. There have not been any employees working in the sales service consultant classification for approximately 4 years. The Petitioner urges that by virtue of the similarities in the job duties between the retail employees and the employees who once worked as sales service consultants, the retail employees should be included in the bargaining unit.

For the reasons set forth the below, I find that the retail sales consultants and the retail support specialists employed at the retail location do not share a sufficient community of interest with employees in the existing bargaining unit. Accordingly, I find that the retail sales consultants and the retail support specialists do not constitute an accretion to the recognized unit and shall order that this petition be dismissed.³

FACTS

Since the 1970's, the Petitioner has represented employees who work at United Telephone of Ohio. Currently, the bargaining unit consists of service technicians and other job classifications in the network service portion of the business and employees who fall within building maintenance and operations job classifications as set forth in Article 2 Recognition, Section 2.1 in the current collective bargaining agreement. In approximately March, 2006 EMBARQ Corporation acquired United Telephone of Ohio from Sprint, Ltd.

The Employer also operates the retail store which is the subject of the instant UC petition. The retail store is in a shopping plaza located at 2023 Elm Street, Warren, Ohio. The retail location opened in May 2006. The Union seeks to represent six employees who work as retail sales consultants and retail support specialists at the retail store. There are three retail sales consultants and one trainee retail sales consultant employee. There are two retail support specialists along with an assistant manager and general manager at the retail store. In addition to the Elm Road retail store, the Employer operates approximately 34 other retail stores in several states. There are no retail sales operations at the South Park location, which is referred to as the

³ In reaching this decision, I am not making a determination as to whether United Telephone Company of Ohio, Inc. and EMBARQ Holding, LLC and EMBARQ Corporation are a single employer or, in the alternative as Petitioner urges, that EMBARQ Corporation is a successor employer to United Telephone Company of Ohio. Even if these entities were a single employer, the requisite community of interest among the employees in dispute is lacking.

business office. Technicians are dispatched out of the 3801 Elm Street facility. The two Elm street locations are about 1 mile apart.⁴

The bargaining unit description includes the classification “sales service consultant.” The business office at South Park Avenue at one time included a call center. The sales service consultants worked in the call center. Prior to 2002, the duty of the sales service consultants was to service customers who made calls to the center. The consultants took service orders from customers and also made adjustments to bills or answered billing questions. Their duties consisted primarily of customer service for the local phone company. Later, the sales consultants were also asked to sell certain phone features or services when customers called the center.

The call center in Warren, Ohio was closed in 2002. In order to improve operational efficiency, the call centers were consolidated in a few locations around the country. The Petitioner urges that the retail sales consultants be included in the bargaining unit as that job classification is similar to the previous sales service consultant position.

The primary duty of the retail sales consultant is to assist customers in the selection and purchase of products and services.⁵ These products include local phone service, wireless and internet merchandise and services. The traditional local phone service aspect of the business is on the decline. The retail stores are in the process of offering an expanded selection of merchandise and services such as TVs, laptop computers, desktop computers, and similar items. The retail stores also have an automated payment center that allows customers to pay their bills in the store.

The retail sales consultant is also responsible for growing the local customer base by participating in promotional events outside of the retail location. The retail sales consultants are paid on a partial quota system. Sixty-five percent of their pay is hourly while 35% of their pay is dependent upon their sales. The retail support specialist is primarily responsible for maintaining store inventory. They also assist customers who have problems with their wireless phone and they participate in sales promotions. The retail support specialists are paid an hourly wage.

The employees at the retail store are supervised by store manager Brian Littleton. Littleton’s responsibilities include hiring the employees who work at the Elm Street location.⁶ The bargaining unit employees have separate day to day supervision from the retail store employees. For the most part, the corporate supervisory hierarchy is completely different for the bargaining unit and retail store employees. Littleton’s superior is located in North Carolina.

There is a minimal amount of contact between bargaining unit employees and the retail store employees. At the time that the retail sales consultants were hired, they trained at the South Park location as the retail store was under construction. The record indicates that the retail sales

⁴ The record does not indicate the distance from the South Park Avenue office to the Elm Street locations.

⁵ The retail stores are open 7 days a week, 10: 00 am to 7:00 pm Monday-Saturday and 1:00 pm to 5:00 pm on Sunday.

⁶ Three of the employees that the Petitioner now seeks to represent were at one time employed by United Telephone Company of Ohio. There is no further detail as to what these three former employees did at United Telephone Company or if their employment was continuous at United Telephone Company of Ohio up until the time that they were hired by EMBARQ Corporation for the retail location.

employees have not gone to the South Park location for any reason. At times, when there is a question about a customer service order, technicians come from the 3801 Elm Street location to the retail store to verify any questions regarding the order. The record does not indicate the frequency with which this is done. The technicians also call the store to clarify any such issues, rather than coming to the retail store. The record also indicates that the retail sales employees have attended promotional events where bargaining unit employees are also present. At one such event, the bargaining unit employees drove trucks while the retail employees distributed candy at the event.

THE RETAIL SALES CONSULTANTS AND RETAIL SUPPORT SPECIALISTS DO NOT CONSTITUTE AN ACCRETION TO THE EXISTING BARGAINING UNIT

The Board has defined an accretion as the addition of a relatively small group of employees to an existing bargaining unit when these additional employees share a sufficient community of interest with the unit employees. **Safety Carrier, Inc., 306 NLRB 960, 969 (1992)**. In **Safeway Stores, Inc., 256 NLRB 918 (1981)**, the Board described the test for accretion as requiring that the group to be accreted have “little or no separate identity” and “have an overwhelming community of interest with the unit.” In determining whether the new employees share sufficient common interest with members of the existing bargaining unit, the Board weighs various factors: including integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills, and functions, common control of labor relations, collective bargaining history and interchange of employees. **Ryder Integrated Logistics, Inc., 329 NLRB 1493, 1499 (1999)**. The Board has also noted that because the accretion process does not afford employees the opportunity to choose their representative, the Board follows a restrictive policy in its application. **Dennison Manufacturing, Co., 296 NLRB 1034, 1036 (1989)**.⁷

The Petitioner urges that I abandon the traditional accretion analysis in this matter. The Petitioner maintains that I should apply the analysis set forth in the Board’s decision in **The Sun, 329 NLRB 854 (1999)**. In that case, the Board indicated that where the bargaining unit is defined by job functions rather than job classifications, the analysis centers upon whether the new employees perform job functions similar to those performed by unit employees as that work is defined in the unit description. Under that approach, the Board will presume that the new employees should be added to the unit unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. Id at 859. The Petitioner asserts that the retail sales consultants are merely an evolved form of the sales service consultants who were employed 4 years ago at the South Park Avenue location.

I decline to employ the analysis set forth by the Board’s **The Sun** decision because the facts of that case are inapposite. The unit description in the present case is defined by job classification, not by job function. In cases where the unit is defined by job classification, the

⁷ The Petitioner has also filed a grievance seeking to include the disputed job classifications in the bargaining unit. At the time of the hearing, the grievance was in the second step of the grievance procedure. It is not appropriate in the circumstances of this case for me to defer to the grievance procedure. **Tweedle Litho, Inc., 337 NLRB 686 (2002)**.

Board has declined to apply the analysis found in **The Sun** in determining whether or not employees should be added to an existing bargaining unit. **Kaiser Foundation Hospitals, 343 NLRB No. 8 (2004); Archer Daniels Midland Co., 333 NLRB 673 (2001).**⁸

Based on the community of interest factors that are normally applied in unit clarification cases, I find that the retail sales consultants and the sales support specialist do not have an overwhelming community of interest with the existing unit and, thus, do not constitute an accretion to the existing unit. There is virtually no interchange of employees among the two facilities or transfers of employees between the retail store and the South Park location. There is at best minimal contact between service technicians and employees in the retail store. Occasionally checking to clarify an order for a customer does not constitute any meaningful contact between employees within the framework of the community of interest analysis.

Also highly significant is the fact that the day-to-day control and supervision of the unit employees is entirely separate from the retail store employees. The Board has indicated that employee interchange and common day-to-day supervision are the two most important factors to be considered in the community of interest analysis in these matters. **E. I. Dupont Inc., 341 NLRB 607 (2004); Archer Daniels Midland Co., Supra at 675.** Given the distinctively different nature of the job duties between the retail sales consultants and the bargaining unit employees, there appears to be little commonality in skills and functions among the employees.

The bargaining unit employees work at locations separate from the retail employees and there appears to be a minimal level of functional integration. The fact that the sales service consultants at one time performed some duties related to selling phone features and services does not outweigh the factors against finding a sufficient community of interest. And the portion of the sales service consultants' job that dealt with customer issues is now being handled by call centers in other parts of the country. Accordingly, I find that the retail sales consultants and the sales support specialists do not constitute an appropriate accretion to the existing bargaining unit as there is an insufficient community of interest to warrant their inclusion in said unit.

Based on the foregoing, and the record as a whole, I shall order that the unit clarification petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petitioned be dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-001. This request must be received by the Board in Washington by August 24, 2006.

⁸ Given that the Board's analysis in **The Sun** is not applicable here, the other similar cases relied upon by Petitioner in its post hearing brief are also inapposite.

Dated at Cleveland, Ohio, this 10th day of August 2006.

/s/ [Frederick J. Calatrello]

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8